Supreme Court, U. S.
FILED
APR 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1407

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT
For Appellants Trainor and O'Malley

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago Illinois 60601 (793-3500),
Attorney for Appellants, Trainor and O'Malley.

PAUL J. BARGIEL,
STEPHEN R. SWOFFORD,
MARK D. PEARLSTEIN,
Assistant Attorneys General,
160 North LaSalle Street, Suite 800
Chicago, Illinois 60601 (793-5635)
Of Counsel.

KEENAN PRINTING COMPANY 365

INDEX

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement of the Case	4
Argument	8
I. The Principles of *Younger* v. *Harris* and *Huffman* v. *Pursue, Ltd.*, Require That This Suit Be Dismissed	8
II. The Procedures Provided For By The Illinois Attachment Act Comport With Principles of Due Process	14
Conclusion	21
Appendix A—The Judgment Appealed From	A1
Appendix B—The Court's Opinion	B1
Appendix C—Notice of Appeal	C1
Appendix D—The Illinois Attachment Act, Illinois Revised Statutes 1973, Chapter 11	D1
Appendix E—Section 11-21 of the Illinois Public Aid Code, Illinois Revised Statutes 1973, Chapter 23, Section 11-21	E1

TABLE OF AUTHORITIES

CASES:

Anonymous v. *Association of the Bar of the City of New York*, 515 F. 2d 427 (2d Cir. 1975) 13

Brandenburg v. *Chicago Knitting Co.*, 102 Ill. App. 303 (1902) 17

Consins v. *Wigoda*, 463 F. 2d 603 (7th Cir. 1972) 13

Duke v. *Texas*, 477 F. 2d 244 (5th Cir. 1973) 13

Fuentes v. *Sheirn*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972) 19

Harrison v. *Morris*, 370 F. Supp. 142 (D. S.C. 1974) ... 20

Huffman v. *Pursue, Ltd.*, 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975) 3, 6, 8-14

Hutchison v. *Bank of North Carolina*, 392 F. Supp. 888 (M.D. N.C. 1975) 20

Lynch v. *Snepp*, 472 F. 2d 769 (4th Cir. 1973) 13

Mitchell v. *W. T. Grant Co.*, 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974) 14-18

MTM, Inc. v. *Baxley*, 420 U.S. 799, 43 L. Ed. 2d 636, 95 S. Ct. 1278 (1975) 3

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975) 18, 19

Rabbitt v. *Weber & Co.*, 297 Ill. 491, 130 N.E. 787 (1921) 17

United States v. *Georgia Public Service Commission*, 371 U.S. 285, 9 L. Ed. 2d 317, 83 S. Ct. 397 (1963) ... 3

Younger v. *Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) 3, 8-14

STATUTES:

28 U.S.C. § 1253 3

28 U.S.C. §§ 2281, 2284 .....2, 6

42 U.S.C. § 1983 2

Ill. Rev. Stat. 1973, ch. 11, § 1 et seq. 3-5, 8, 9, 14, 16-19

Ill. Rev. Stat. 1973, ch. 23, § 11-21 .....5, 8, 19

IN THE

Supreme Court of the United States

October Term, 1975

No. ——

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT
For Appellants Trainor and O'Malley

JURISDICTIONAL STATEMENT

Appellants James Trainor and Vivan O'Malley appeal from the final judgment of a three-judge court in the United States District Court for the Northern District of Illinois, Eastern Division. Appellants respectfully submit this Statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the district court is reported at 405 F. Supp. 757 (N.D. Ill. 1975).The court's judgment and its opinion in this case are reprinted herein at Appendices A and B, respectively.

JURISDICTION

Appellees brought this class action under 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. § 1983, seeking to have the district court declare invalid and enjoin the appellants from enforcing the Illinois Attachment Act, on the ground that the procedures provided for by that Act deprived appellees of their property without due process of law in violation of the fourteenth amendment to the United States Constitution. A three-judge court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, entered its judgment on December 15, 1975, granting appellees the relief sought.

Appellants Trainor and O'Malley filed their Notice of Appeal in the district court on February 3, 1976, a copy of which is reprinted at Appendix C (Appellants Finley and Elrod filed a Notice of Appeal on February 10, 1976). Jurisdiction of the Supreme Court of the United States

to review this case by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of this Court to review this judgment on direct appeal:

MTM, Inc. v. *Baxley,* 420 U.S. 799, 43 L. Ed. 2d 636, 95 S. Ct. 1278 (1975);

United States v. *Georgia Public Service Commission,* 371 U.S. 285, 9 L. Ed. 2d 317, 83 S. Ct. 397 (1963).

STATUTE INVOLVED

The Illinois Attachment Act, Illinois Revised Statutes 1973, Chapter 11, is reprinted at Appendix D.

QUESTIONS PRESENTED

1. Whether the principles of *Younger* v. *Harris,* 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), and *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), apply to the present case where appellees sought to have the federal district court enjoin appellants —State officials—from prosecuting a pending attachment proceeding against appellees in the Illinois courts.

2. Whether the procedures provided for by the Illinois Attachment Act, Illinois Revised Statutes 1973, Chapter 11, afford appellees—attachment debtors—due process of law.

STATEMENT OF THE CASE

Appellees (hereinafter referred to as "plaintiffs") brought this class action in the district court challenging the constitutionality of the Illinois Attachment Act (reprinted at Appendix D), after the State of Illinois, on the relation of the Illinois Department of Public Aid, instituted attachment proceedings against plaintiffs in the Illinois courts. The Department filed its State suit to attach monies on deposit in plaintiffs' credit union account on the ground that plaintiffs applied for and received public assistance while fraudulently concealing the existence of that account.

The Illinois Attachment Act provides that a creditor having a money claim may attach the property of his debtor in any one of nine narrow circumstances, all of which either concern fraudulent conduct on the part of the debtor or the insecurity of the creditor due to the debtor's absence from the State (§1). A creditor is entitled to a writ of attachment if he files with the clerk of the court an affidavit setting forth the nature and amount of the claim and one of the nine circumstances set forth in section one (§2). In cases sounding in tort the creditor is required to be examined under oath by a judge concerning the cause of action (§2). Except where an agency of the State is involved, the creditor is required to furnish a bond in double the amount of the claim or double the amount of the property to be attached (§§ 4a, 4b).

Upon filing of a proper affidavit and the posting of bond, the clerk issues a writ of attachment directed to the sheriff, who executes the writ and also serves it upon the debtor (§§ 6, 8, 10). The writ is returnable and the debtor

must appear or answer on a date set by the plaintiff, which date shall not be less than ten nor more than sixty days from the date of the writ (§§ 6, 25). The creditor must file his complaint ten days before the return day, and if he does not do so within five days after the return date, the suit is subject to dismissal (§25). The debtor may at his option contest the attachment by a motion to quash, answer the creditor's claim on the merits (§27), or file any other paper appropriate to a civil proceeding (§26), such as a motion to dismiss. The burden of proof of establishing the propriety of the attachment and the underlying claim is upon the creditor. If the attachment is found to be wrongful, the debtor may recover damages and costs (§§ 4a, 27).

The debtor also has the right to retain or recover possession of the property in question by posting a bond in double the value of the property or in the amount of the debt (§§ 14, 15). In absence of this bond, the sheriff retains custody of the attached property (§ 14), or in the case of garnishment, the garnishee must withhold the property from the debtor (§ 21).

The Illinois Department of Public Aid brought its attachment suit on October 30, 1974, pursuant to section 11-21 of the Illinois Public Aid Code (Ill Rev. Stat. 1973, ch. 23, § 11-21, reprinted at Appendix E), which authorizes the Department to bring a civil and/or crimial action against any aid recipient who has concealed facts which would affect his eligibility for financial aid. The Department filed both the required affidavit and its complaint, which alleged that plaintiffs here (defendants in the state court) had fraudulently concealed the existence of monies in their credit union account, and that as a result, the Department had provided public assistance in the amount of $3,720.20, for which plaintiffs were not eligible.

The writ of attachment was thereupon issued and executed against the credit union account on November 5, 1974. Plaintiffs were served with the writ, complaint, and affidavit on November 8, 1974. Plaintiffs appeared on the return date, which had been set for November 18, 1974, but were informed that the matter had been continued until December 19, 1974.

Plaintiffs then brought the present action in the district court on December 2, 1974, attacking the validity of the Illinois Act and asking for injunctive relief. The plaintiffs asserted that the Illinois Act violates the due process clause in that it authorizes creditors to attach the assets of debtors upon allegations of fraudulent conduct without judicial review and without prior notice or an opportunity to be heard. The plaintiffs prayed that defendant Danaher (defendant Finley's predecessor) and all other clerks for the judicial circuits of Illinois be enjoined from issuing writs of attachment; that defendant Elrod and all other county sheriffs of Illinois be enjoined from executing such writs; and that defendants Trainor and O'Malley be enjoined from applying for such writs. The plaintiffs also requested a temporary restraining order and permanent injunction requiring defendants to dismiss the writ of attachment issued against the plaintiffs and return their property. Temporary relief was denied after defendants agreed to release one-half of the attached funds.

A three-judge court was designated pursuant to 28 U.S.C. § 2284, on March 21, 1975. The parties filed memoranda on the due process issue after defendants filed a motion to dismiss and plaintiffs cross-filed for summary judgment. The district court then directed that additional memoranda be filed in light of this Court's decision in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). The district court certified

this suit as both a plaintiff and defendant class action on October 1, 1975.

The court entered its judgment and opinion on December 15, 1975, granting plaintiffs the relief they requested. The defendants filed a motion for a stay of injunction pending appeal, which the court denied on February 25, 1976, the Honorable Wilber F. Pell, Jr., United States Circuit Court Judge, dissenting.

The State court attachment proceedings have been suspended, pending the final disposition of this case.

ARGUMENT

I.

THE PRINCIPLES OF *YOUNGER* v. *HARRIS* AND *HUFFMAN* v. *PURSUE, LTD.* REQUIRE THAT THIS SUIT BE DISMISSED.

The same considerations which governed this Court's disposition of *Younger* v. *Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), are equally applicable here, and dictate that the district court should have dismissed the instant case. Instead of deferring to the Illinois courts which are surely competent to handle any due process problems present in the pending attachment proceedings which gave rise to this case, the district court went to the merits of plaintiffs' constitutional challenge, striking down the Illinois Attachment Act and enjoining defendants—State officials—from proceeding under that Act.

Briefly stated, the *Younger* case held that absent certain extraordinary circumstances, considerations of equity, comity, and federalism preclude the federal courts from enjoining pending criminal prosecutions. This doctrine was extended to the civil arena in *Huffman*, at least where the "State is a party to the . . . proceeding, and the proceeding is both in aid of and closely related to criminal statutes." 420 U.S. at 604, 43 L. Ed. 2d at 492. Notwithstanding the facts that the State was the plaintiff in the pending attachment suit involved here and that the State was proceeding in aid of a statute which gave it the option of pursuing criminal and/or civil remedies in cases of welfare fraud, Ill. Rev. Stat. 1973, ch. 23, § 11-21, the district court held

Huffman inapplicable. The basis of the court's holding was that the Illinois Attachment Act provides a civil action available to anyone—public or private—while the statute in *Huffman* "gave an exclusive right of action to the State" and was itself quasi-criminal in nature. (Appendix B, p. B5). The Court found it "mere happenstance that the State of Illinois was the petitioner in the attachment proceeding," and "coincidental that the pending state proceedings may arguably be quasi-criminal in nature" (Appendix B, p. B5).

It is the State's position that the principles enunciated in *Younger* and *Huffman* are applicable to pending State civil proceedings generally, and to the present case particularly. In *Younger* this Court set forth the considerations underlying "the national policy forbidding federal courts to stay or enjoin state court proceedings except in exceptional circumstances" (401 U.S. at 42, 27 L. Ed. 2d at 674), as follows (401 U.S. at 43-44, 27 L. Ed. 2d at 675-76):

> The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal

sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism". . . . [This concept represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

The Court reiterated these principles in *Huffman* with particular emphasis on comity and federalism (420 U.S. at 601, 43 L. Ed. 2d at 490), and noted that the threat posed to our federal system by federal court interference is just as applicable to civil as well as criminal proceedings (420 U.S. at 604, 43 L. Ed. 2d at 492). The Court also identified the ways in which federal interference offends the principles of comity and federalism. Such interference results in duplicative legal proceedings, reflects negatively on the State court's ability to enforce constitutional principles (420 U.S. at 603, 43 L. Ed. 2d at 491), and prevents the State from effectuating its substantive policies and continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections to those policies (420 U.S. at 604, 43 L. Ed. 2d at 492).

It should be apparent that the above factors are fully applicable to the present case. Plaintiffs had the opportunity in the State court to assert the same constitutional objections which it presented to the federal district court, by filing a motion to quash, which would have come on for hearing on December 19, 1974—nearly a full year before the decision in this case. Such a course would have avoided dual proceedings, given the State an opportunity to rule on its own substantive policies (perhaps more definitively), and afforded the State courts the respect to which they are entitled.

The only possible bar to the application of *Younger* and *Huffman* to civil proceedings lies in the inapplicability of the principle "that equity will not enjoin a criminal prosecution" (420 U.S. at 604, 43 L. Ed. 2d at 492; 420 U.S. at 613, 43 L. Ed. 2d at 497, dissenting opinion), which the Court in *Younger* stated "may have grown out of circumstances peculiar to the English judicial system and not applicable in this country" (401 U.S. at 44, 27 L. Ed. 2d at 675). To the extent that this criminal factor retains any of its validity, it apparently rests on the State's paramount interest in defining crimes (420 U.S. at 614, 43 L. Ed. 2d at 498, dissenting opinion) and the additional protections afforded defendants in a criminal prosecution (420 U.S. at 615, 43 L. Ed. 2d at 499, dissenting opinion). Practically speaking, it is difficult to see why the State's interest in defining civil actions is any the less significant, especially in this case where the interest involved is the prevention of welfare fraud. And while it is true that civil proceedings provide lesser procedural guarantees, the sanctions resulting from these proceedings also have a significantly lesser impact.

Even assuming that *Huffman* is not applicable to civil proceedings generally, it should surely be applied in the

present case. The district court was able to avoid the *Huffman* doctrine only by focusing in on its supposed limited applicability to a certain class of civil cases, and then applying the supposed limitation to a case which might have been brought under the Illinois Act. Because of the nature of the considerations which gave rise to *Younger* and *Huffman,* however, it would seem that the limitation of *Huffman,* if valid at all, should be applied only to the specific proceeding before the court. In other words, the principles of *Younger* and *Huffman* apply to the instant case because the State is a party and the State civil proceeding involved is in aid of a criminal statute. Considerations of equity, comity and federalism are no less applicable to the present case merely because a private party could have brought a strictly civil action under the Illinois Act.

The extraordinary circumstances in which *Younger* and *Huffman* do not apply (and which help preserve the federal court's function as the ultimate guarantor of federally secured rights) are not present in this case. There is absolutely no indication of bad faith or harassment (420 U.S. at 611, 43 L. Ed. 2d at 496) in this suit. Nor is there any question of irreparable injury which resulted from the attachment of the $600 in plaintiffs' credit union. Plaintiffs earned a combined income of $15,719.81, during the period from January 1 through November 23, 1974. Their combined income during the period from April 17, 1972, through February 13, 1973, in which they collected $4,123.76 in public assistance, was more than $10,000.

The district court did hold that the Illinois Act was "patently and flagrantly violative of the constitution" (Appendix B, p. B5). The court, however, applied an unconstitutional "on its face" standard (Appendix B, p. B9-10). The proper standard is "flagrantly and patently violative

of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it" (420 U.S. at 611, 43 L. Ed. 2d at 496, 401 U.S. at 53-54, 27 L. Ed. 2d at 691). Assuming *arguendo,* that the application of the Illinois Act here violates plaintiffs' due process rights[1], it is not difficult to imagine situations and constructions of the Illinois Act which would pass constitutional muster, especially where the underlying debt sounds in tort and a pre-attachment hearing is, therefore, required. Moreover, the Act applies to actions already commenced, where the debtor is before the court and has had an opportunity to answer the creditor's complaint. In such circumstances, plaintiffs' due process allegations would be inapplicable.

In light of the district court's erroneous interpretation of *Huffman,* and the sensitive interests of federal-state relations involved in this case, it is submitted that this appeal deserves the plenary consideration of this Court. Furthermore, other lower federal courts have applied the principles of *Younger* and *Huffman* to State civil proceedings, and are thus in conflict with the district court's holding here. *Anonymous* v. *Association of the Bar of the City of New York,* 515 F. 2d 427 (2d Cir. 1975); *Duke* v. *Texas,* 477 F. 2d 244 (5th Cir. 1973); *Lynch* v. *Snepp,* 472 F. 2d 769 (4th Cir. 1973); *Cousins* v. *Wigoda,* 463 F. 2d 603 (7th Cir. 1972).

---

1. In light of Argument II, *infra,* which demonstrates the validity of the Illinois Act, it is impossible to see how the court reached the conclusion that the Act was patently and flagrantly unconstitutional.

II.

THE PROCEDURES PROVIDED FOR BY THE ILLINOIS ATTACHMENT ACT COMPORT WITH PRINCIPLES OF DUE PROCESS.

Assuming *arguendo,* that the principles of *Younger* and *Huffman* do not apply to this case, this Court should nevertheless take this case for plenary consideration so that the procedures of the Illinois Attachment Act can be tested against the due process requirements of the fourteenth amendment. The procedures in question here compare quite favorably with those which this court upheld in *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974). The district court's decision, however, effectively restricted the holding of *Mitchell* to the facts of that case rather than applying the traditional due process balancing of interests test to the facts of this case, as is mandated by the *Mitchell* decision.

In *Mitchell* this Court upheld a Louisiana statute which provides for sequestration of property where "one claims the ownership or right to possession of property . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Under the statute a writ of sequestration issues "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts." The creditor is required to make this showing before a judge. He may do so, however, on ex parte application, without notice to the debtor or an opportunity to be heard. The debtor is entitled to seek immediate dissolution of the writ unless the creditor "proves the grounds upon which

the writ was issued" (416 U.S. at 605-06, 40 L. Ed. 2d at 412-13).

In *Mitchell* the creditor filed suit alleging default in payment on an installment sales contract and requested that the property over which it had a vendor's lien be sequestered. The creditor also asserted that it had reason to believe that the debtor would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Based on the creditor's petition and affidavit, a Louisiana State court ordered, without prior notice or an opportunity for the debtor to be heard, that the property be sequestered. The property was seized on February 7, 1972, and on March 3rd, the debtor attacked the sequestration as violative of his due process rights. The court upheld the sequestration on March 16th, which decision was affirmed by the Supreme Court of Louisiana (416 U.S. at 601-03, 40 L. Ed. 2d at 410-11).

In upholding the Louisiana provision, this Court weighed the competing interests involved, stating (416 U.S. at 610, 40 L. Ed. at 415):

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." Due process of law guarantees "no particular form of procedure; it protects substantial rights." "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller. [citations omitted]

The Court found the possible deterioration and destruction of the property over which the creditor had a lien to be a significant interest which outweighed the impact on the debtor of the deprivation of the property in question, in view of the low risk of a wrongful sequestration under the procedures of the Louisiana statute (416 U.S. at 610, 40 L. Ed. 2d at 415).

The Court also stated (416 U.S. at 609, 40 L. Ed. 2d at 414):

> [T]here is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn ex parte documents, followed by the early opportunity to put the creditor to his proof. [citations omitted]

In balancing the interests, risks, and statutory safeguards under the Illinois Attachment Act, it seems clear that the scales tip toward the validity of the Act, at least as applied here. The creditor is required to file an affidavit setting forth the nature and amount of his claim, as well as one of the nine narrow circumstances in which attachment may issue (§§ 1, 2). The affidavit must allege facts unequivocally, and not merely on information and belief

(*e.g. Rabbitt* v. *Weber & Co.*, 297 Ill. 491, 130 N.E. 787 (1921); *Brandenburg* v. *Chicago Knitting Co.*, 102 Ill. App. 303 (1902)). And while such averments might be characterized as somewhat conclusory (see court's opinion, Appendix B, p. B 10), they are no more so than the creditor's in *Mitchell*. Furthermore, in this case, a sworn complaint was filed in the State court contemporaneously with the filing of the affidavit, which specifically set forth the basis of the State's claim.

While a creditor's lien is not involved in this case, as was in *Mitchell*, the Illinois Act is narrowly drawn to extend only to cases of fraud or the debtor's absence from the State. These circumstances present a very real and definite threat to the creditor—far more so than was involved in *Mitchell*.

In actions sounding in tort, the creditor must be examined by a judge concerning his cause of action before a writ of attachment may issue (§2),[2] In contract actions, the matters involved are ordinarily substantiated by documentary proof (416 U.S. at 609, 40 L. Ed. 2d at 415), which in practical effect means that an ex parte appearance before a judge would be a mere formality. The debtor is also protected by the creditor's bond, except where a State

---

2. The complaint filed in the State court in this case proceeded upon a contract theory. Since the underlying claim is fraud, however, it seems apparent that plaintiffs could have attempted an attack on the writ of attachment as being illegally issued, in that fraud sounds in tort, and thus, it was necessary for State to apply to a judge for the writ. Whether the State should have so proceeded in this case is a question peculiarly for the State courts.

agency is the creditor as here (§§ 4a, 4b), and may recover damages for wrongful attachment in all cases (§4a, 27). The debtor may also recover possession of the property by filing a bond (§§ 14, 15). Destruction of the attached property is precluded because the Sheriff retains custody of it (§14).

The debtor is also given an early, through admittedly not immediate, hearing within sixty days of the attachment (§§ 6, 25),[3] and he may well be able to advance the date of the hearing by filing a motion to dismiss. At the hearing he may either attack the attchment itself or defend on the underlying claim (§ 26). The burden of proof is on the creditor.

In sum, the impact of the attachment on the debtor under the Illinois Act is outweighed by the immediate and serious threats to creditors as narrowly defined by the Illinois Act (§ 1), the provisions safeguarding against wrongful attachments (§§ 2, 4a, 4b, 14, 26, 27), and the debtor's early opportunity for a hearing (§§ 6, 25).

The validity of the *Mitchell* approach to the due process requirements of seizure of a debtor's property was in no sense impaired by this Court's holding in *North Georgia*

---

3. Plaintiffs surveyed the attachment cases filed in Cook County, Illinois in 1974. Of the 97 cases initiated, they located 78 case files. The average period of time in these cases between the date on which the writ of attachment was served and the return date was 18.2 days, the longest period being 59 days. In the 13 cases in which the debtors appeared on the return day, the average period of time between the date the writ was served and the trial date was 39 days, the longest period being 70 days. In the present case, the period between service of the writ and the scheduled trial date was 42 days.

Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975), as plaintiffs claimed in the district court. The statute in this case had "none of the saving characteristics of the Louisiana statute" (419 U.S. at 607, 42 L. Ed. 2d at 757), while the statute involved in this case closely parallels the Louisiana provision.

Moreover, the Illinois Act, as applied in this case, passes constitutional muster even under the broad sweep of *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). While striking down two pre-judgment replevin statutes in that case, this Court recognized that certain governmental interests may serve as a basis for immediate pre-trial action (407 U.S. at 90-91, 32 L. Ed. 2d at 575-76);

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. [Citations and footnotes omitted].

The attachment of funds in plaintiffs' credit union account is "directly necessary to secure an important governmental interest." The Illinois Department of Public Aid attached the amount as part of its general effort to eliminate various forms of welfare fraud (Ill. Rev. Stat. 1973, ch. 23, § 11-21; See Appendix E). There is a "special need for very pr mpt

action," because in dealing with the type of welfare case at issue, there is a real danger that the recipient under investigation will take steps to hinder the inquiry by either removing the funds from their present location or leaving the jurisdiction. The State has a significant interest in the subject property that has been attached, which cannot be sufficiently protected if a lapse of time were to ensue before seizure of the property. The State has exercised its statutory authority to investigate and correct fraudulent acts only after careful investigation, and is able to exercise this authority to attach property only where there is a very real danger of inability to collect the money to which it is entitled, absent attachment.

In light of the vital state interests involved in this case and the fact that this Court has not spoken to the validity of procedures like those provided for by the Illinois Act, it is respectfully submitted that this Court give this case plenary consideration. The following cases are inconsistent with the district court's decision in this case: *Hutchison* v. *Bank of North Carolina,* 392 F. Supp. 888 (M.D. N.C. 1975); *Harrison v. Morris,* 370 F. Supp. 142 (D. S.C. 1974).

CONCLUSION

For the foregoing reasons, appellants believe that the questions presented by this appeal are substantial and of broad importance and application. Appellants, therefore, respectfully urge this Honorable Court to give this case its full consideration and reverse the district court's judgment.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),
Attorney for Appellants,
Trainor and O'Malley.

PAUL J. BARGIEL,
STEPHEN R. SWOFFORD,
MARK D. PEARLSTEIN,
Assistant Attorneys General
160 North LaSalle Street, Suite 800
Chicago, Illinois 60601 (793-5635)
Of Counsel.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Defendants.

No. 74 C 3473

ORDER

In accordance with this Court's memorandum opinion, the Court enters judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure as follows:

1. Illinois Revised Statutes, Chapter 11, Sections 1, 2, 2a, 6, 8, 10 and 14 are on their face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Defendants Finley and Elrod are ordered to cause release of all property of plaintiffs Juan and Maria Hernandez attached pursuant to writ of attachment.

3. Defendant Finley and all other clerks for the judicial circuits of Illinois, their successors, agents and employees are hereby enjoined from issuing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

4. Defendant Elrod and all other county sheriffs of the State of Illinois, their successors, agents and employees are hereby enjoined from executing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

5. Defendants Trainor and O'Malley are hereby enjoined from authorizing and processing applications for writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth.

6. Defendants Finley and Elrod, all other clerks of the judicial circuits of Illinois, and all other county sheriffs of Illinois, are ordered to cause release of any property currently attached pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth, and give notice of such release to all persons whose property is the object of such attachments.

7. The question of plaintiffs' entitlement to money damages is remanded for determination to Judge Kirkland, the Judge to whom this case was originally assigned.

ENTER:

WILBUR F. PELL, JR.,
U.S. Circuit Court Judge

JOEL M. FLAUM
U.S. District Court Judge

ALFRED Y. KIRKLAND
U.S. District Court Judge

DATED: Dec. 15, 1975

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Defendants.

No. 74 C 3473

Before PELL, Circuit Judge, FLAUM and KIRKLAND, District Judges.

KIRKLAND, District Judge. This matter comes before the Court on motion of defendants to dismiss the complaint for failure to state a claim upon which relief could be

granted. Plaintiffs have cross-filed for summary judgment on entitlement to declaratory and injunctive relief. Further, on instruction by the Court, the parties briefed the issue of whether, in light of *Huffman* v. *Pursue Ltd.*, —— U.S. ——, 95 S. Ct. 1200 (1975), this Court should enjoin a pending state attachement proceeding against plaintiffs prior to exhaustion of state judicial remedies.

The Illinois Department of Public Aid ("IDPA") filed suit in Circuit Court of Cook County, Illinois, on October 30, 1974, alleging that plaintiffs had fraudulently concealed the existence of monies while applying for and receiving public aid assistance. Simultaneous with filing of this suit, IDPA filed an attachment complaint which resulted in attachment of plaintiffs' funds in a credit union on November 5, 1974. After answering the complaint and filing their appearance, plaintiffs filed the instant complaint in federal court challenging the constitutionality of the Illinois Attachment Act and seeking declaratory, injunctive and other relief.

Jurisdiction is alleged under 28 U.S.C. §1343 (3) and (4) and 42 U.S.C. §1983. The complaint challenges the constitutionality of the Illinois Attachment Act, Ch. 11 §§1, 2, 2a, 6, 8, 10, and 14. The Act is alleged to be unconstitutional both on its face and as applied on grounds that it violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Two issues are presented to this Court for decision: (1) does *Huffman* v. *Pursue Ltd., supra,* prevent this Court from intervening in a state civil proceeding filed pursuant to a state statute alleged to be unconstitutional; and (2) if the preceding question is answered in the negative, are the challenged portions of the Illinois Attachment Act unconstitutional?

I. MUST FEDERAL ACTION BE RESTRAINED PENDING EXHAUSTION OF STATE REMEDIES?

The Supreme Court in *Huffman* extended for the first time the doctrine of non-interference with state criminal proceedings, articulated in *Younger* v. *Harris,* 401 U.S. 37 (1971), to a civil proceeding. The remedy presently sought by plaintiffs would require this Court to enjoin a state court civil proceeding; hence we are constrained at the outset to examine the applicability of *Huffman* prior to any consideration of the merits of this case.

The only obstacle to reaching the merits of this case would be a determination that the principles articulated in *Huffman* apply here.

It is clear that this Court is empowered to enjoin state action under certain circumstances, notwithstanding the general prohibition against such injunctions found in 28 U.S.C. §2283. *Mitchum* v. *Foster,* 407 U.S. 225 (1972), held that the anti-injunction rule of Section 2283 does not apply to civil rights actions under 42 U.S.C. §1983. Likewise, if the Illinois attachment proceeding were determined not to be "proceedings in a state court", the anti-injunction statute by its own terms would not apply. This Court holds the challenged attachment proceeding to be a pending proceeding within the meaning of Section 2283.

The *Huffman* case arose out of an attempt by the State of Ohio to close a theatre which showed allegedly obscene films, on grounds that the theatre was creating a public nuisance. The state proceeded under the Ohio nuisance statute, which defined a place exhibiting obscene films as a nuisance. The Ohio Court determined in an adversary proceeding that the films were obscene and immediately

ordered that the theatre be closed. Following this decision, and without exhausting state appellate procedure, the theatre operator filed suit in federal court. A three-judge district court held that closing of the theatre by the Ohio State Court was violative of the plaintiff operator's constitutional rights because the films had not been declared obscene prior to their exhibition. The plaintiff operator had not exhibited any films after the determination that said films were obscene.

The Supreme Court vacated the order of the three-judge court on grounds of equity, comity, and federalism, holding that the principles of *Younger* v. *Harris, supra.*, were applicable even though the state proceeding was civil in nature.

The *Younger* decision gave approval to long-standing policy that federal courts should not interfere with state criminal proceedings except in extraordinary circumstances. See *Fenner* v. *Boykin*, 271 U.S. 240 (1926); *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935); *Stefanelli* v. *Minard*, 342 U.S. 117 (1951). *Younger* specifically held that federal injunctive relief should not be employed against state criminal prosecutions except: (1) upon a showing of "irreparable injury" that is both "great and immediate"; or (2) where the statute in question is "flagrantly and patently violative of express constitutional prohibitions". 401 U.S. at 53.

The decision in *Huffman* is significant in that it represents the first extension of these principles to non-criminal proceedings. In extending this doctrine, the Court stated that action of the State of Ohio was more akin to criminal proceedings than most civil cases. 95 S.Ct. 1208. This Court is of the opinion, however, that *Huffman* v. *Pursue Ltd.* is not applicable here for two reasons.

First, the rule of *Younger* was established for, and has been limited in application to, criminal proceedings. The Court's principal justification for extension of the *Younger* doctrine in *Huffman* was that Ohio's civil proceeding was "in aid of and closely related to criminal statutes". 95 S. Ct. 1208. In *Huffman*, the State of Ohio proceeded under a statute which gave an exclusive right of action to the state. By contrast, the Illinois Attachment Act provides a cause of action for any person, public or private. It is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding. It is likewise coincidental that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act, they need not be. These major distinctions preclude this Court from extending the principles of *Younger*, based on considerations of equity, comity and federalism, beyond the quasi-criminal situation set forth in *Huffman*.

Second, an express exception to the *Younger* rule of non-interference in state criminal proceedings exists where the challenged statute is patently and flagrantly violative of the constitution. This Court is of the opinion that the present case falls within that exception, for reasons hereinafter set forth.

II. IS THE ILLINOIS ATTACHMENT ACT UNCONSTITUTIONAL?

Four recent Supreme Court cases are controlling authority in an analysis of constitutional validity of summary creditor remedies. These cases include *Sniadach* v. *Family Finance Corp.*, 397 U.S. 254 (1969), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing Inc.* v. *Di-Chem Inc.*, —— U.S. ——, 42 L. Ed. 753 (1975).

In *Sniadach* v. *Family Finance Corp., supra,* the Court held that a Wisconsin pre-judgment garnishment procedure which resulted in garnishment of wages without notice and prior hearing, violated fundamental principles of due process.

In *Fuentes* v. *Shevin, supra,* the Supreme Court examined the replevin acts of Florida and Pennsylvania. Both acts authorized the issuance of pre-judgment writs of replevin through a summary process of *ex parte* application to the court clerk, accompanied by the posting of bond for an amount in excess of the property's value. Neither act provided for notice and prior hearing or an immediate post-seizure hearing. Both acts did permit the respondent to recover his replevied property upon posting of a bond in double the amount of its value. The Court held that procedural due process required that a person in possession of chattels be given an opportunity for a hearing prior to issuance of a writ of replevin. The Court further held that posting of a bond was a minimal deterrent to abusive or even good faith use of the replevin procedure and constituted no substitute for a pre-seizure hearing.

In *Mitchell* v. *W. T. Grant Co., supra,* the Supreme Court carved out an exception to the pre-seizure hearing rule promulgated in *Sniadach* and *Fuentes.* There the Court upheld the validity of a Louisiana sequestration act which authorized sequestration of encumbered property upon *ex parte* application of a creditor without notice to the debtor or opportunity for prior hearing. The Court found, however, that the Louisiana act did provide safeguards not present in those statutes analyzed in *Sniadach* and *Fuentes.*

First, the Louisiana act required the creditor to file an affidavit before a judge, setting forth factual rather

than conclusory allegations which entitled the creditor to relief. A writ would only issue by the judge upon the proper showing. Second, and of equal importance, the act expressly entitled the debtor to an immediate post-seizure hearing; a hearing in which the burden was upon the creditor to prove the allegations contained in the affidavit. The Court found that these provisions sufficiently safeguarded the rights of the debtor to eliminate necessity for prior notice and hearing.

A Georgia garnishment act was examined by the Court in *North Georgia Finishing Inc.* v. *Di-Chem, supra.* The Court determined that Georgia's summary procedure for garnishment satisfied neither the *Sniadach* and *Fuentes* requirement of pre-seizure hearing, nor the alternative judicial safeguards approved in *Mitchell.*

Having briefly summarized the applicable law, the Court now turns to the Illinois statute under constitutional challenge.

The Illinois Attachment Act (Illinois Revised Statutes, Ch. 11, 1973) authorizes a creditor with a money claim, whether liquidated or unliquidated and whether sounding in contract or tort, to attach the assets of an alleged debtor pending outcome of a lawsuit against the debtor on the money claim. The creditor can obtain a writ of attachment prior to filing his complaint against the debtor[1] and prior to the debtor having received notice of impending attachment or an opportunity to be heard on the question of whether the writ should issue.

---

1. Pursuant to §25 of the Act, the complaint must be filed at least ten days before the return date of the writ of attachment.

Section 1 of the Act provides for attachment in any of nine circumstances. Plaintiffs specifically attack four subsections which authorize attachment upon the creditor's allegations of debtor fraud:

> SIXTH: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.
>
> SEVENTH: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.[2]
>
> EIGHTH: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors. NINTH: Where the debt sued for was fraudulently contracted on the part of the debtor. . . . Ill. Rev. Stat., Ch. 11 §1, sixth through ninth.

A creditor will be entitled to a writ of attachment, against an alleged debtor's property, upon the filing of an affidavit by the creditor, or his agent or attorney, which sets forth in verbatim statutory language one of the above allegations, along with the nature and amount of the claim and the name and place of residence of the debtor. Upon filing of this affidavit and the required bond with the clerk of the circuit court, the clerk issues a writ of attachment directing the sheriff to serve it upon the debtor, or another person holding the debtor's property.

If the action sounds in tort, under Section 2 of the Act the creditor must apply to a judge of the circuit court.

---

2. This is the sole allegation of fraud set forth in the affidavit of Defendant O'Malley upon which the writ of attachment was issued.

The judge, after questioning the creditor concerning the cause of action, endorses upon the affidavit the amount of damages for which the writ shall issue. Upon service of the writ, the sheriff takes and retains custody of the property attached or directs a third party in possession to withhold the attached property from the debtor.

The debtor may obtain release of his property prior to trial on the merits of the creditor's claim in two ways. First, the debtor can file a bond in double the value of the property attached, upon the condition that said property will be available for execution should judgment be rendered against him. Alternatively, he can file a bond in a sum sufficient to cover the amount of debt or damages alleged plus costs of suit.

Second, Section 27 of the Act provides that defendant debtor may answer by affidavit, denying the allegations set forth in the creditor's attachment affidavit; and if the court finds for defendant after trial on the merits of the attachment, the writ will be quashed. This section, however, does not give defendant an absolute right to a hearing on the attachment issue immediately after seizure.

The debtor whose property has been attached is thereby deprived of the use of his property from the date the writ is served until an uncertain future time when he receives a hearing on the attachment issue. Even if the debtor should seek a separate hearing thereon on the return date, the debtor can be deprived of his property for a period of sixty days, since Section 6 of the Act provides that the creditor shall set the return date from ten to sixty days after date of the writ.

It is clear on its face that the Illinois Attachment Act does not meet the due process standards established by the Supreme Court in the cases previously discussed.

The Illinois Act does not provide for pre-seizure hearing as required by *Fuentes*. Because of *Mitchell* v. *W. T. Grant Co., supra,* however, this Court does not hold that pre-seizure hearing is any longer an absolute requirement. However, neither does the Act provide the alternative safeguards approved by *Mitchell*. Specifically, the Illinois Act does not require the attachment creditor to set out facts in his affidavit which would entitle him to relief. The Act does not require the complainant to present such affidavit to a judge for determination of whether a writ should issue. Instead, the Act provides that upon conclusory allegations in verbatim statutory language, coupled with certain procedural information, a writ will automatically issue from the clerk of the court.

The provision for judicial review in tort cases is limited only to the question of potential damages and determination of limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn facts as was the case in *Mitchell*.

Neither does the Act provide for an *immediate* post-seizure hearing upon application of the debtor, a hearing in which the attachment creditor bears the burden of proving his entitlement to relief at risk of dissolution of the writ. The Illinois Act merely provides for a post-seizure hearing on application by the debtor at a time to be set at the convenience of the Court. The Court, therefore, is under no duty to set an immediate hearing.

For these reasons, this Court holds that the Illinois Attachment Act is on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs are entitled to injunctive relief against defendants. Separate order to issue in accordance with this opinion.

December 15, 1975.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ, et al., Plaintiff-Appellees, vs. MORGAN M. FINLEY, et al., Defendants-Appellants.	Civil Action No. 74 C 3473

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James Trainor and Vivian O'Malley, defendants herein, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on the 15th day of December, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1253.

WILLIAM J. SCOTT
Attorney General
State of Illinois
By: PAUL J. BARGIEL
Assistant Attorney General
160 North LaSalle Street,
Suite 800
Chicago, Illinois 60601
(793-5635)

RECEIVED
FEBRUARY 3, 1976

H. STUART CUNNINGHAM, CLERK
UNITED STATES DISTRICT COURT

PROOF OF SERVICE

I, Paul J. Bargiel, one of the attorneys for James Trainor and Vivian O'Malley, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of February, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On Juan Hernandez and Maria Hernandez, individually and on behalf of all other persons similarly situated, plaintiffs, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

Alan Dockterman
1413 West 18th Street
Chicago, Illinois 60608

James Latturner, Catherine Reichelderfer & Fred L. Lieb
4564 N. Broadway
Chicago, Illinois 60640

2. On Morgan M. Finley, Clerk of the Circuit Court of Cook County, Illinois, and Richard J. Elrod, Sheriff of Cook County, Illinois, defendants, by mailing copies in duly

addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

Bernard Carey
State's Attorney of Cook County, Illinois
John A. Dienner, III
Assistant State's Attorney
500 Civic Center
Chicago, Illinois 60602

By: PAUL J. BARGIEL
Assistant Attorney General
160 N. LaSalle St., Suite 800
Chicago, Illinois 60601
(793-5635)

SUBSCRIBED AND SWORN to
before me this 3rd day
of February, 1976.

MAUREEN WALSH,
NOTARY PUBLIC

APPENDIX D

THE ILLINOIS ATTACHMENT ACT, ILLINOIS REVISED STATUTES 1973, CHAPTER 11.

1. Causes.] § 1. In any court having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor: Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

1a. Venue.] § 1a. The venue provisions applicable to other civil cases shall apply to attachment proceedings; and in addition thereto, attachment proceedings may be brought in the County where property or credits of the debtor are found.

2. Affidavit — Statement — Examination under oath.] § 2. To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of the circuit court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in section 1, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action. In all actions sounding in tort, before the writ of attachment shall be issued, the plaintiff, his agent or attorney, shall apply to a judge of the circuit court of the county in which the suit is to be brought or is pending and be examined,

under oath, by such judge concerning the cause of action; and, thereupon, such judge shall indorse upon the affidavit the amount of damages for which the writ shall issue, and no greater amount shall be claimed.

2a. Form of affidavit.] § 2a. Affidavits for attachment before courts may be substantially in the following form:

STATE OF ILLINOIS,)
) ss.
..... County)

A B, being duly sworn, says: That (here state if affiant is agent or attorney of the creditor; if suit is by an individual or corporation, the name of such individual or corporation, and if the suit is by a firm, the name of the partners) has a just demand against (name of debtor), on account of (here make short statement of the nature and amount of the claim), and the affiant believes (the name of the creditor) is entitled to recover of said (name of debtor), after allowing all just credits and set-offs ..... dollars and ..... cents. which is now due, and that he has good reason to believe and does believe that (name of debtor) (here state the residence of the debtor if known, or if not, that the affiant has made diligent inquiry and cannot ascertain his place of residence.)

.....

Subscribed and sworn to before me on this ..... day of ....., ..., A.D.

.....

My commission expires ....., ..., A. D.
(If action sounds in tort here include the endorsement

of judge as to amount of damages for which writ shall issue.)

3. Names, etc., heirs, etc.] § 3. [Omitted]

4. § 4. Repealed]

4a. Bond — State and its departments and officers exempt.] § 4a. Before granting an attachment, as aforesaid, the clerk shall take bond and sufficient security, payable to the People of the State of Illinois, for the use of the person or persons interested in the property attached, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in said proceedings, and all damages and costs which shall be recovered against the plaintiff, for wrongfully suing out such attachment — which bond, with affidavit of the party complaining, or his agent or attorney, shall be filed in the office of the clerk granting the attachment. Every attachment issued without a bond and affidavit taken, is hereby declared illegal and void, and shall be dismissed: Provided, however, that nothing herein contained shall be construed to require the State of Illinois, or any Department of Government thereof, or any State officer, to file a bond as plaintiff in any proceeding instituted under this Act.[1]

4b. Court may fix bond in double value of property to be attached.] § 4b. The court, or a judge thereof, upon ex parte motion, without notice, supported by affidavit of the plaintiff, his agent or attorney, substantially describing the property to be attached, and the value thereof, may, if satisfied of the bona fides of the application and sufficiency of the bond under the circumstances of the case,

---

[1]Section 1 et seq. of this chapter.

including proposed garnishments, fix the amount of the bond in double the value of the property to be attached, instead of double the sum sworn to be due, and in such event the writ shall direct the officer to attach said specifically described property, but the value of said property to be attached shall not be in excess of an amount sufficient to satisfy the debt claimed and costs. The court may require that said affidavit be supplemented by additional showing, by appraisal or otherwise, as to the value of said property, and may, upon motion of any party to the action claiming an interest in said property, either before or after actual attachment, require additional security, or order release of the attachment to the extent not covered by adequate double security.

5. Condition of bond.] § 5. The condition of the bond required in the preceding section[1] shall be applicable to alias and pluries writs as well as original writs and shall be substantially in the following form:

The condition of this obligation is such, that whereas the above bounden ..... hath, on the day of the date hereof, prayed an attachment out of the ..... Court of said County, at the suit of ..... against the estate of the above named ..... Now, if the said ..... shall prosecute his suit with effect, or in the case of failure therein shall well and truly satisfy all costs which may be awarded to said ..... or to any person or persons interested in the property attached, and all damages and costs which shall be recovered against the plaintiff for wrongfully suing out the said writ of attachment, or alias or pluries

---

[1]"Preceding section" now repealed. But see section 4a, ante.

writ or writs of attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Additional bonds shall not be required for the issuance of alias and pluries writs, except as provided in Section 10a[2] of this Act.

6. Writ — Form.] § 6. The writ of attachment required in the preceding section shall be directed to the sheriff (and, for purpose only of service of summons, to any person authorized to serve writs of summons), or in case the sheriff is interested, or otherwise disqualified or prevented from acting, to the coroner of the county in which the suit is commenced, and shall be made returnable on a return day designated by the plaintiff, which day shall not be less than ten days or more than sixty days after its date. Such writ shall be substantially in the following form: ,The People of the State of Illinois to the Sheriff of ..... County: or for the purpose only of service as summons; to any person authorized to serve writs of summons: — Greeting:

Whereas A B (or agent or attorney of A B, as the case may be), hath complained that C D is justly indebted to the said A B to the amount of ..... and that (here state the cause set out in the affidavit) and the said ..... having given bond and security, according to law: We therefore command you that you attach so much of the estate, real or personal, of the said C D, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the affidavit, but in case any specific property of the said C D, found in your county shall be described in this writ, then you

---

[2]Section 10a of this chapter.

shall attach said described property only, and no other property, the said specified property to be so attached, being described as follows:

.....

.....

and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law; and that you summon C D to appear and answer the complant of said A B, before the ....Court of ..... at ..... in the county of ..... on the ..... day of ..... next; and that you also summon ..... and such other persons as you shall be required by the said A B, as garnishees, to be and appear before the said court on the said ..... day of ..... next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness ..... clerk of the said court, this ..... day of ..... in the year of our Lord, etc.

Which writ of attachment shall be signed by the clerk, and the seal of the court shall be affixed thereto.

7. Attachment against a joint debtor.] § 7. In all cases where two or more persons are jointly indebted, either as partners or otherwise, and an affidavit shall be filed as provided in the first section of this act, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and the effects of such as are so brought within the provisions of this act; and the officer shall be also directed in said writ to summon, all defendants to the action, whether the at-

tachment is against them or not, to answer to the said action, as in other cases of joint defendants.

8. Execution of writ.] § 8. Such officer shall without delay execute such writ of attachment upon the property described in the writ, or in the absence of such description, upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands and tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value to satisfy the claim sworn to, with costs of suit as commanded in such writ.

Except as provided in Section 11[1] of this act, the writ of attachment may be levied only in the county to which the writ is issued, and by a proper officer of said county.

9. Certificate of levy — Effect.] § 9. [Omitted]

10. Serving defendant — Return.] § 10. The officer shall also serve said writ upon the defendant therein, if he can be found, in like manner as provided for service of summons in other civil cases. The return of such writ shall state the particular manner in which the same was served. If the writ is served upon the defendant less than ten days before the return day thereof, he shall not be compelled to appear or plead until fifteen days after the return day designated in the writ. The writ of attachment may be served as a summons upon defendants wherever they may be found in the State, by any person authorized to serve writs in like manner as summons in other civil cases.

10a. Alias and pluries writs.] § 10a. [Omitted]

11. Pursuit of property.] § 11. [Omitted]

12. Writ issued and served on Sunday.] § 12. [Omitted]

---

[1]Section 11 of this chapter.

13. Writs to other counties.] § 13. [Omitted]

14. Possession — Forthcoming bond.] § 14. The officer serving the writ shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court, unless the person in whose possession the same is found shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached with condition that the said estate and property shall be forthcoming to answer the judgment of the court in said suit. The sheriff, or other officer shall return such bond to the court in which the suit is brought, on the day to which such attachment is returnable.

15. Bond or recognizance to pay judgment.] § 15. Any defendant in attachment, desiring the return of property attached, may, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered or a recognizance, in substance as aforesaid, may be taken in open court, and entered of record, in which case the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance judgment may be rendered and execution issued as in other cases of recognizance. In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons.

16. Neglect of officer to take bond — Proceedings.] § 16. [Omitted]

17. Neglect to return sufficient bond — Proceedings.] [Omitted]

18. Suit on bond.] § 18. [Omitted]

19. Sustenance of live stock — Compensation.] § 19. When any sheriff or other officer shall serve an attachment on horses, cattle or live stock, and the same shall not be immediately replevied or restored to the debtor, such officer shall provide sufficient sustenance for the support of such live stock until the same shall be sold or discharged from such attachment. He shall receive therefor a reasonable compensation, to be ascertained and determined by the court out of which the attachment issued, and charged in the fee bill of such officer, and shall be collectible as part of the costs.

20. Perishable property.] § 20. When any goods and chattels are levied on by virtue of any attachment, and the sheriff or other officer having custody of such goods and chattels is of the opinion that they are of a perishable nature and in danger of immediate waste or decay, such sheriff or other officer shall demand that the plaintiff in such attachment obtain from the court out of which the attachment issued an order permitting such property to be sold not later than 24 hours after the levy has been made, upon due notice of sale to the defendant and to the public as the court in its order shall require. The money arising from such sale shall be liable to the judgment obtained upon such attachment, and deposited in the hands of the clerk of the court to which the process is returnable.

If the plaintiff in the attachment fails or refuses to obtain such an order for sale of perishable property, the sheriff or other officer making the levy shall be absolved of all responsibility to any person for loss occasioned by

the failure to sell or care for such perishable property. The demand of the sheriff or other officer shall be written and shall be delivered to the plaintiff or his attorney or agent, and to the defendant if found. If defendant is not found, a copy of the demand shall be posted on the premises where the perishable items are located. Plaintiff's motion for an order of sale of perishable property shall be treated as an emergency motion.

21. Garnishment.] § 21. The sheriff or any other person authorized to serve writs of summons shall, in like manner as writs of summons are served in ordinary civil cases, summon, wherever they may be found in the State, the persons mentioned in such attachment writ as garnishees and all other persons whom the creditor shall designate as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ. The persons so summoned shall be considered as garnishees. The return shall state the names of all persons so summoned, and the date of such service on each.

Persons summoned as garnishees shall thereafter hold any property, effects, choses in action or credits in their possession or power belonging to the defendant which are not exempt, subject to the court's order in such proceeding, and shall not pay to the defendant any indebtedness owed to him subject to such order, and such property, effects, choses in action, credits and debts shall be considered to have been attached and the plaintiff's claim to have become a lien thereon pending such suit. A security which is transferable as provided in Section 8-320 of the Uniform Commercial Code[1] is, for purposes of this Act,

---

[1]Chapter 26, § 8-320.

only in the possession or power of the person which carries on its books an account in the name of the defendant in which is reflected an interest in such security, or, if such security has been pledged by the defendant, the pledgee of the defendant.

22. Notice by publication and mail.] § 22. When it shall appear by the affidavit filed or by the return of the officer, that a defendant in any attachment suit is not a resident of this State, or the defendant has departed from this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and that property of the defendant has been attached, or that persons having such property or effects, choses in action or credits belonging to defendant, or owing debts to him, have been summoned as garnishees, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper published in this State, most convenient to the place where the court is held, of such attachment or garnishment, and at whose suit, against whose estate, for what sum, and before what court the same is pending, and that unless the defendant shall appear, give bail, and plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached or garnisheed sold or otherwise disposed of as provided by law. And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact.

23. Default.] § 23. No default or proceeding shall be taken against any defendant not served with summons within the State and not appearing, unless the first publication or personal service outside of the State be at least thirty days prior to the day at which such default or proceeding is proposed to be taken.

24. Continuance for want of publication or service.] § 24. If for want of due publication or service the cause shall be continued, the same proceedings shall be had at a subsequent return day to be fixed by the court, as might have been had at the return day at which the writ is returnable.

25. Filing of complaint — Answer or appearance — Time.] § 25. The complaint shall be filed ten days before the return day of the attachment, and if so filed the defendant, subject to the provisions of Section 10 of this Act,[1] shall file his answer or otherwise make his appearance on or before said day. If the complaint is not so filed the defendant shall not be compelled to appear or answer until fifteen days after the return day designated in the writ and if the complaint is not filed five days after the return day designated in the writ the defendant may, in the discretion of the court have the suit dismissed.

26. Civil Practice Act — Application.] § 26. The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act.

---

[1]Section 10 et seq. of this chapter.

27. Pleadings.] § 27. The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons.

28. Amendments.] § 28. [Omitted]

29. Interpleading.] § 29. In all cases of attachment, any person, other than the defendant, claiming the property attached, or garnisheed may intervene, verifying his petition by affidavit, without giving bond, but such property shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of the property. In all cases where the jury finds for the claimant, and that such claimant is also entitled to the possession of all or any part of such property, the court shall enter judgment for such claimant accordingly and order the property attached or garnisheed to which such claimant is entitled to be delivered to such claimant, and the payment of his costs in such action. In cases where the jury finds for a claimant but further find that such claimant is not then entitled to the possession of any such property such claimant shall be entitled to his costs; and where the jury find for the plaintiff in the attachment, such plaintiff shall recover his cost against such claimant. If such claimant is a non-resident of the State he shall file security for costs as in case of non-resident plaintiff.

30. Counterclaim.] § 30. Any defendant against whom an attachment may be sued out under this Act, may avail himself in his defense of any counter-claim properly pleadable by the laws of this State.

31. § 31. Repealed]

31a. Change of parties — Other amendments.] § 31a. [Omitted]

32. § 32. Repealed]

33. Proceedings in aid.] § 33. Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served with process in the original cause, notice of the pendency of the suit, and of the issue and levy of the attachment, shall be given as is required in cases of original attachment; and such notification shall be sufficient to entitle the plaintiff to judgment, and the right to proceed thereon against the property and estate attached, and against garnishees, in the same manner and with like effects as if the suit had been commenced by attachment.

34. Effect of judgment.] § 34. When the defendant has been served with the writ, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons; and execution may issue thereon, not only against the property attached, but the other property of the defendant.

35. Judgment by default — Special execution.] § 35. When the defendant shall be notified as aforesaid, but not served with process within the State, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded upon to final judgment as in other cases of default, but in no case shall judgment be rendered against the defendant for a greater sum than appears, by the affidavit of the plaintiff, to have been

due at the time of obtaining the attachment, with interest, damages and costs; and such judgment shall bind, and a special execution shall issue against the property, credits and effects attached, and no execution shall issue against any other property of the defendant; nor shall such judgment be any evidence of debt against the defendant in any subsequent suit.

36. Property levied upon.] § 36. [Omitted]

37. Division of proceeds — Priority.] § 37. [Omitted]

38. Statement of participating judgments — Officer to divide proceeds.] § 38. [Omitted]

39. Payment into court.] § 39. [Omitted]

39a. Sale of livestock levied upon.] § 39a. [Omitted]

40. Appeals.] § 40. The plaintiff or defendant in any attachment, person intervening, and the sheriff, or either of them, who may feel aggrieved by the final order or judgment of the court, may prosecute appeals as by law is provided in other civil cases.

41. Fraud.] § 41. This act shall be construed in all courts in the most liberal manner for the detection of fraud.

42. Repeal.] § 42. [Omitted]

43. Repealed]

44. Amendment to pleadings. § 44. [Omitted]

APPENDIX E

Illinois Revised Statutes 1973, Chapter 23:

11—21. § 11—21. Fraud—Penalty.) Any person who by means of any false statement, willful misrepresentation, or failure to notify the county department or the local government unit, as the case may be, of a change in his status as required by sections 11—18 and 11—19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or through other fraudulent device obtains or attempts to obtain, or aids or abets any person in obtaining financial aid under this Code to which he is not entitled, shall be guilty of a Class A misdemeanor.

If an applicant makes and subscribes an application form under Section 11—15 which contains a written declaration that it is made under penalties of perjury, knowing it to be false, incorrect or incomplete in respect to any material statement or representation bearing on his eligibility, income or resources, the offender shall be subject to the penalties for perjury as provided in Section 32—2 of the "Criminal Code of 1961", approved July 28, 1961, as amended.[1]

A person who receives financial aid for which he was not eligible as a result of his making any false statement, wilful misrepresentation, or failure to notify the county department or local governmental unit, as the case may be, of a change in his status as required by Sections 11—18 and 11—19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or by other fraudulent device, or a person who knowingly aids or abets any person in obtaining financial aid for which he is not eligible, shall be answerable to the county depart-

---

1. Chapter 38, § 32—2.

ment or the local government unit, as the case may be, for refunding the entire amount of aid received. If the refund is not made, it shall be recoverable in a civil action from the person who received the aid, or from anyone who wilfully aided such person to obtain the aid. If fraud is proven in such action, the court may as a penalty assess an additional sum of money, up to but not in excess of the entire amount of aid provided, against the recipient or against any person who wilfully aided the recipient. If assessed, the penalty shall be included in any judgment entered for the aid received, and paid to the county department or the local governmental unit, as the case may be.